Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

JOHN T. LUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prohibition of false statements intended to influence a bank's decision found in § 1014 of Title 18 includes within it all omissions of information intended to influence the bank's decision.

2. Whether a statute which forbids false statements may, consistent with the Due Process clause and the Rule of Lenity, be read to include mere silence.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Fifth Circuit are Petitioners John T. Lundy and Gary Matthews and the United States of America as the Respondent.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

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PETITION FOR A WRIT OF CERTIORARI

John T. Lundy through counsel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix to this Petition at 1a. The Order of the Court of Appeal denying the petitions for rehearing is published in the Appendix at 26a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2002 and motions for rehearing were denied on March 20, 2002. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part that:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

2. Section 1014 of Title 18 of the United States Code provides in pertinent part that:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of any institution the accounts of which were insured by the Federal Deposit Insurance Corporation . . . upon any application . . . or loan or any change or extension of . . . the same . . . shall be fined not more than $1,000,000 or imprisoned not more than thirty years, or both."

STATEMENT

On December 11, 1998 Petitioner was indicted by a federal grand jury. The indictment charged him with conspiring to commit the offenses of bank fraud, bank bribery, and making false statements to a federally insured institution all in violation of 18 U.S.C. § 371; and with committing the substantive offenses of bank fraud in violation of 18 U.S.C. § 1344; bank bribery in violation of 18 U.S.C. § 215(a); and three counts of making a false statement to a federally insured financial institution in violation of 18 U.S.C. § 1014. C.A.R. at 298. On September 18, 1999 a superceding indictment was filed. The superceding indictment restated the previous charges but added a fourth count of making false statements to a federally insured financial institution in violation of 18 U.S.C. § 1014. C.A.R. at 152. The case proceeded to trial on January 18, 2000. C.A.R. 298. On that date the government dismissed two of the counts of the indictment alleging false statements (C.A.R. 298). On February 2, 2000 the trial court

dismissed another of the false statement counts. C.A.R. 413. During trial the government proposed a jury instruction that defined "false statement" for the purposes of 18 U.S.C. § 1014 as follows:

> "A person makes a false statement under this statute if he fails to disclose material information to a federally insured bank in connection with a loan transaction." Transcript, Vol. I at p. 18.

Petitioner objected to this instruction arguing that it defined false statement too broadly (Transcript, Vol. IX at pp. 137-148); and that it erroneously permitted a jury to convict on the basis of the omission of information which Petitioner ". . . was never asked, [and] had no legal obligation to provide . . ." (Transcript, Vol. IX at p. 146). Petitioner offered specific examples of how the requested instruction would apply to circumstances clearly not contemplated by the statute. Transcript, Vol. IX at p. 141. The trial court expressed its doubts about the instruction but eventually accepted it. Transcript Vol. IX, pp. 142, 147, 148. The trial court's instructions were applicable to both the substantive count of false statement and the conspiracy to make false statements. The trial court also instructed the jury that an agreement to make false statements constituted a conspiracy as charged in Count I of the indictment and that membership in that conspiracy would permit the jury in certain circumstances to convict Petitioner of other substantive offenses committed by his co-defendant. Transcript Vol. X, p. 15. The contested definition of false statement, therefore, potentially infected all counts of the indictment.

On February 7, 2000 the jury returned a verdict of guilty of one count of conspiracy, one count of bank fraud, one count of making a false statement, and one count of bank bribery. From that conviction Petitioner appealed to the Fifth Circuit Court of Appeals. The appeal asserted among other things that the trial court's definition of false statements was

overbroad and violated both the *Rule of Lenity and Due* Process notice requirements. On January 28, 2002 the Appellate Court denied Petitioner's appeal. In addressing Petitioner's arguments regarding the definition of "false statement", the Appellate Court stated:

> ". . . the § 1014 instruction required finding Defendants intentionally failed to disclose material information to a federally insured bank regarding a loan transaction *for the purpose of influencing its lending activities*, which is more than the statute requires. *See* 18 U.S.C. § 1014. There is no error, plain or otherwise.
>
> With respect to Defendants' remaining contentions concerning the § 1014 instruction, and as discussed above, an intentional omission of material fact can constitute a false statement if made for the purpose of influencing a federally insured bank's lending activities."

Appellate Court's decision at pp. 26-27.

It is this holding of the Appellate Court that Petitioner challenges. Petitioner filed petitions for rehearing and rehearing en banc with the Appellate Court, which were denied on March 20, 2002. Appendix at page 26a.

A. Reasons For Granting The Petition.

As described in detail below, the Court of Appeals has in this matter decided an important question of federal law that has not been but should be settled by this Court. That decision involves an interpretation of the prohibition found in § 1014 of Title 18 of false statements intended to influence the actions of a federal or federally insured financial institution. The Court of Appeals reads § 1014's prohibition of false statements to include a prohibition of all omissions of information intended to influence the banks action. Such a reading of the statute dramatically increases its purview and

by implication the purview of many other false statement statutes. It does so in a manner that brings within the statute's prohibition a broad range of common and innocuous business practices. If permitted to stand such a reading will result in the unintended disruption of widely accepted business practices and the imposition of unjust punishment on many borrowers.

The Appellate Court's decision is also impliedly inconsistent with the decisions of this Court and the several Appellate Courts which have defined "false statement" more narrowly. These decisions include *Williams v. U.S.*, 458 U.S. 279 (1982), and *U.S. v. Diogo*, 320 F.2d 898 (2nd Cir. 1963).

The Court of Appeals found no error in a jury instruction that defines false statement under Section 1014 as the failure to disclose material information to a federally insured bank in connection with a loan transaction for the purpose of influencing its lending activities. Appellate decision at page 26. As explained below such a holding works an enormous, unprecedented, and unwarranted expansion of the statute and interprets the statute in a manner which is both inconsistent with its plain wording and gives no notice of that which it prohibits.

B. Expansion of the Statute

The first problem with the Appellate Court's holding is its overbreadth. It interprets the statute in a manner that makes it applicable to most loan negotiations with federally insured institutions. By defining false statement to include all omissions intended to influence the lending activity, the appellate court brings within the aegis of the statute all loan negotiations in which the borrower has deliberately not told the bank some fact with the hope of influencing the negotiations. One need only consider a few examples to realize the breadth of this interpretation. Consider the borrower who is willing and able to pay a ten percent interest

on a loan under negotiations but negotiates a loan at a rate of eight percent without telling the bank that he was willing and able to pay ten percent. As § 1014 is interpreted by the Appellate Court, this borrower could be sentenced to thirty years in prison for omitting a fact with the intention of influencing the banks lending decision. Similar results would apply to borrowers who do not tell one bank of the offers made by their competitors or who do not tell the bank officer their religion because they believe it lessens the likelihood of their receiving the loan. The possibilities are endless. Thus a statute that on its face serves the noble and logical purpose of prohibiting false statements to a federally insured bank has now been read to prohibit routine and innocuous activity that occurs in many and probably most loan transactions. This Court has previously expressed its concern over the potential expansion of § 1014 into areas of seemingly unremarkable conduct. In *William v. U.S.*, 458 U.S. 279, 286-87 (1982), the Court rejected an interpretation of §1014 that would have greatly broadened its purview.

> "Equally as important the Government's interpretation of § 1014 would make a surprisingly broad range of unremarkable conduct a violation of federal law. While the Court of appeals addressed itself only to check kiting, its ruling has wider implications: it means that any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to a criminal liability, whether or not the drawer had an intent to defraud."

Williams v. U.S., supra at 286.

> "Yet if Congress really set out to enact a national bad check law in § 1014 it did so with a peculiar choice of language and in an unusually backhanded manner. . . . Absent support in the legislation history for the proposition that § 1014 was designed to have general application to the passing of worthless checks [citation

> omitted] we are not prepared to hold petitioners conduct proscribed by *that particular statute.*"

Williams v. U.S., supra at 287.

The same theme was addressed in *U.S. v. Wells*, 519 U.S. 482, 498 (1997), where the Court accepted a particular interpretation of § 1014 in part because it would not effect an unwarranted expansion of the statute.

> "It is true that we have held § 1014 inapplicable to depositing false checks at a bank, in part because we thought that it would have "made a surprisingly broad range of unremarkable conduct a violation of federal law; *Williams v. U.S.*, 458 U.S. at 286-287 n.8, . . . and elsewhere thought it possible to construe a prohibition narrowly where a loose *mens rea* requirement would otherwise have resulted in a surprisingly broad statutory sweep, see *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 . . . but an unqualified reading of § 1014 poses no risk of criminalizing so much conduct as to suggest that Congress meant something short of the straight-forward reading. The language makes a false statement to one of the enumerated financial institutions ~~a crime only~~ if the speaker knows the falsity of what he says and intends it to influence the institution."

U.S. v. Wells, supra at 499-500.

The Court has also read other criminal statutes narrowly in order to avoid including within their purview ". . . a broad range of apparently innocent conduct "*Liparota v. U.S.*, 471 U.S. 419, 426 (1985). *See e.g. Staples v. U.S.*, 511 U.S. 600 (1994) (Court rejected a statutory reading which would criminalize behavior that a defendant believed fell within a long tradition of widespread lawful gun ownership by private individuals); *Morisette v. U.S.*, 342 U.S. 246 (1952) (Court reads scienter requirement into welfare statute to avoid criminalizing broad range of apparently innocent conduct);

and *U.S. v. X-Citement Video, Inc.*, 513 U.S. 69 (1994) (Court reads *mens rea* requirement into child pornography statute to avoid criminalizing otherwise innocent activity). More than any of the cases cited above this case presents the risk of expanding a criminal statute into broad areas of innocuous and apparently innocent activity. Moreover, in each of the cited cases the language of the statute could plausibly be read to suggest the broader reach. The Court's decisions in those cases turned not so much on the wording of the statute as on the fact that the broader reading reached into areas of seemingly innocent conduct. That same principle applies to this case but with the additional impetus that the plain wording of the § 1014 requires the narrower reading.

C. The Appellate Court's Reading of the Statute Is Unprecedented

The Appellate Court has cited no case which supports its interpretation of § 1014, and a review of the case law reveals no similar interpretation by any court in America. While there are numerous cases which hold that omissions may in certain circumstances constitute false statements under § 1014, no case suggests that all omissions intended to influence the banks decision constitute false statements. As noted above, this Court in *U.S. v. Wells*, supra at 500, has stated that § 1014 is applicable only ". . . if the speaker knows the falsity of what he says . . ." Such a requirement is inconsistent with the Appellate Court's definition of "false statement" in this case. Even in the Fifth Circuit the case law requires that only omissions needed to avoid deception may constitute false statements under § 1014. *See U.S. v. Dupre*, 117 F.3d 818, 819 (5th Cir. 1997); *U.S. v. Trice*, 823 F.2d 80, 86 (5th Cir. 1987); and *U.S. v. Greene*, 578 F.2d 648, 657 (5th Cir. 1978). There is no case in the Fifth Circuit or elsewhere which goes further. The Appellate Court's reliance on *U.S. v. Doke*, 171 F.3d 240, 246 (5th Cir. 1999), for its new definition of "false statement" is inappropriate. *Doke* is

a "straw" borrower case where the straw borrower falsely told the bank that he was putting his own money into the deal and omitted telling them he was fronting for the real borrower who could not borrow more money because of the bank's lending limits. *Doke*, therefore, fits neatly into the cases relying on omissions needed to avoid deception. There is a very big difference between an omission of information on one hand and an omission of information needed to avoid deception on the other. One remarkable aspect of the Appellate Court's decision is that it both untethers the definition of "false statement" from the concept of deception and requires no affirmative act by the borrower. No previous case has done this. If the decision below is allowed to stand, omissions not intended to deceive will now constitute felonies punishable by up to 30 years in prison. While there is no case which specifically rejects the holding of the Appellate Court, there is much which impliedly rejects it. In the 54 years since the inception of § 1014, no court appears to have suggested an interpretation similar to that adopted by the Appellate Court in this case. The *United States Code* contains at least 100 false statement statutes. *U.S. v. Wells*, supra at 505 (dissent). Counsel has been unable to locate a single case interpreting any of those statutes in a manner consistent with the Appellant Court's decision in this case but many that reject such logic. The cases dealing with 18 U.S.C. § 1001 provide a good example. Section 1001 forbids among other things false statements in matters of federal jurisdiction. It is therefore similar to § 1014 which forbids false statements to certain federal and federally insured financial institution. In this very similar statute, the courts have rejected the Appellate Court's conclusion in this case.

> "The requirement of an affirmative act is implied in the second clause of § 1001 by the statutes proscriptions of false statements."

U.S. v. London, 550 F.2d 206, 212 (5th Cir. 1977).

> "Thus a false representation charge requires that the defendant made a misrepresentation or used a document that contained a false statement or entry *in other words that the defendant made some sort of active misrepresentation.* [emphasis added]

U.S. v. Crop Growers Corp., 954 F.Supp 335 (D.D.C. 1997).

> ". . . where a statute or regulation imposes no duty whatever to disclose information due process concerns require that criminal liability not be based on omission of such information."

U.S. v. Crop Growers Corp., *supra* at 345.

In *U.S. v. Diogo*, 320 F.2d 898 (2nd Cir. 1963), the Court in interpreting both Section 1001 and Section 1546 of Title 18 (forbidding false statements in immigration applications) rejected "mere omissions" as a basis for a false statement case.

> "We do not read the quoted passage to suggest that a prosecution for false representations can be grounded upon omission of an explanation which omission carries with it implications of a state of facts which were not . . . true. To so hold would distort the language of the statute . . ."

U.S. v. Diogo, *supra* at 905.

While the above cited cases deal with false statement statutes other than § 1014, they all deal with statutes similar to § 1014 and reflect a logic equally applicable to § 1014. *See* also *U.S. v. Watts*, 72 F.Supp 2d 106, 117 (E.D. N.Y. 1999) (defenses described in *Diogo* are equally applicable to § 1014).

That the Appellate Court's holding in this case is inconsistent with American legal notions of what constitutes a false statement is reflected in the Restatement of Law.

Two provisions of the Restatement of Law deals with a non-disclosure. The first is § 551 of *Restatement of 2d Torts* which provides as follows:

"§ 551. LIABILITY FOR NONDISCLOSURE

1. One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

   a. matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

   b. matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

   c. subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

   d. the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

   e. facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the

relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

The second applicable provision is found in § 161 of the *Restatement 2d Contracts*, which provides:

"§ 161. WHEN NON-DISCLOSURE IS EQUIVALENT TO AN ASSERTION

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

a. where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

b. where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

c. where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

d. where the other person is entitled to know the fact because of a relation of trust and confidence between them."

These two standards for civil liability well reflect American legal concepts of when an omission may constitute false statement. Notably they are both significantly inconsistent with the holding of the Appellate Court. Indeed it is difficult to find any support in either criminal or civil law for the proposition espoused by the Appellate Court that all

omissions intended to influence loan negotiations constitute false statements.

In the closely related concept of fraud, the case law is similarly inconsistent with the notion that mere omissions may constitute a crime.

> "At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"

Chiarella v. U.S., 445 U.S. 226, 227-28 (1980).

> "And of course there can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated."

U.S. v. Irwin, 654 F.2d 671, 679 (10th Cir. 1981) *cert. denied* 455 U.S. 1016 (1982).

See also U.S. v. Brown, 79 F.3d 1550, 1556-57 (11th Cir. 1996); *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995); and *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). The relevance of the fraud cases is further supported by this Court's decision in *Williams* to reject a broader reading of § 1014 in part because it included acts which did not include an intent to defraud. *Williams v. U.S.*, supra at 286.

The Appellate Court in this matter has concluded that under § 1014 all omissions intended to influence the bank's decision constitute false statements and are therefore punishable under the statute. This conclusion is inconsistent

with all existing precedent, as well as American notions of what constitutes and actionable false statement.

D. Rule of Lenity and Due Process

The Appellate Court in this case has interpreted a prohibition of "false statements" to federally insured banks to include within it all omissions of information intended to influence the bank's decision. The Court's failure to comport its holding to the plain wording of the statute violates the related concepts found in the Rule of Lenity and Due Process clause of the Fifth Amendment. The beginning point for all statutory interpretation is, of course, the wording of statute. Where that language is plain the inquiry should end. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The language of § 1014 is plain. In applicable part, it forbids the knowing making of a false statement for the purpose of influencing any loan. It cannot reasonably be argued that this language was plainly intended to cover all omissions of information intended to influence the loan. However, were there any ambiguity in the statutory language the Rule of Lenity requires that ambiguity be resolved in Petitioner's favor.

> ". . . before one can be punished it must be shown that his case is plainly within the statute."

Fasulo v. U.S., 272 U.S. 620, 629 (1926).

> "when choice has to be made between two readings of what Congress has made a crime, it is appropriate before we chose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

U.S. v. Bars, 404 U.S. 336, 347 (1971).

Indeed in circumstances more conducive to a broad reading of § 1014 than those here at bar this Court has relied on the Rule of Lenity to require the narrower reading. *See Williams*

v. U.S., supra at 290. Such a reading is consistent with ancient and fundamental principles of American jurisprudence.

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature not in the judicial department."

U.S. v. Wiltberger, 18 U.S. 35, 43 (5 Wheat 76, 95) (1820).

That the Appellate Court's reading of § 1014 flies in the face of these maxims is evident both in the plain wording of the statute and in other interpretations of the meaning of "false statement." For example as previously noted, this Court has interpreted the language of § 1014 to require proof that the author of the false statement "know the falsity of what he says . . ." *U.S. v. Wells, supra* at 500. The Appellate Court 's reading of § 1014 implicitly rejects that requirement. In interpreting a similar prohibition of "false statements in § 1001 the Fifth Circuit held that the requirement of an affirmative act is implied in § 1001 by the statutes prohibition of false statements." *U.S. v. London, supra* at 212.

Closely related to the Rule of Lenity is the Due Process requirement of fair notice. This doctrine requires:

> ". . . that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 356, 357 (1983).

In the *Williams* case, the Court concluded that the term "false statement" would not commonly be used to describe a bad check. (*Williams v. U.S.*, supra at 286.) Similarly in this

case common usage would not define "false statement" as every omission of information, nor would ordinary people conclude that a law forbidding false statements to a bank required them to unilaterally inform the bank of all facts that might influence its decision regardless of whether the bank asks about those facts. In analyzing § 1001 the Court in *Crop Growers Corp.* concluded that ". . . where a statute or regulation imposes no duty whatever to disclose information, due process concerns require that criminal liability not be based on omission of such information." *U.S. v. Crop Growers Corp.*, supra at 905. This conclusion is further supported by the Absurd Result Principle. This principle rejects even the plain wording of statutes if that wording leads to an absurd and plainly unintended consequence. *See U.S. v. American Trucking Assoc. Inc.*, 310 U.S. 534, 543 (1940). As reflected in the example described above, the Appellate Court's interpretation of § 1014 in this case leads to an absurd and plainly unintended result. It must therefore be rejected.

Finally, the legislative history of § 1014 does not alter the conclusions reached above. Notions of the importance of legislative history may vary. *See The Mercy Of Scalia: Statutory Construction And The Rule of Lenity* by Sarah Newland, Harvard Civil Rights-Civil Liberties Law Review at 197 (Winter 1994). However, no view of legislative history would work a change in the conclusions described above.

> ". . . it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."

Crandon v. U.S., 494 U.S. 152, 160 (1990).

The legislative history of § 1014 is not easily deciphered. The statute was enacted in 1948 as an amalgamation of 13 different preexisting false statement statutes. Counsel has been unable to locate any reference in the legislative histories

of § 1014 or its predecessors which speaks to the issues here at bar. Perhaps most telling, however, is that there appears to be no case law interpreting any of § 1014's predecessor statutes in a manner consistent with the Appellate Court's reading. It is doubtful that Congress intended to adopt an interpretation of § 1014 never previously evidenced in the case law. This is reinforced by the passing of 54 years without a single Court interpreting § 1014 in that manner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20961

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GARY R. MATTHEWS, JOHN T. LUNDY,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
(H-98-CR-491-2)

Before DUHE, WIENER, and BARKSDALE, *Circuit Judges.*

RHESA HAWKINS BARKSDALE, *Circuit Judge* [1]

The primary issue in this bank fraud case is the sufficiency of the evidence against Gary R. Matthews and John T. Lundy. They also base error on jury instructions and the admission of bank policies and of testimony claimed subject to the marital privilege. AFFIRMED.

I.

Calumet Farm, in Lexington, Kentucky, was a very prominent thoroughbred farm. Its prize stallion was Alydar, one of the top two or three stud stallions in the world during

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[1] Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

the late 1980s. From 1980 until 1991, Calumet was operated by Lundy, as president, and Matthews, as financial officer and counsel. Lundy had "full discretionary management powers".

By 1987, Calumet was having substantial cash flow problems and difficulty keeping current its payments to its long-time lender, Citizens Fidelity of Lexington, Kentucky. Citizens Fidelity loan officers determined Calumet was losing monthly almost $1 million, as the thoroughbred industry was experiencing a downturn. When Calumet requested a loan increase to $30 million (from $25 million), Citizens Fidelity declined because of the size of the loan and Calumet's inability to generate sufficient cash flow to service it.

Consequently, Matthews and Lundy turned to Frank Cihak, vice chairman of First City National Bank in Houston, Texas. (In this case, Cihak was an unindicted coconspirator of Matthews and Lundy.[2] In May 1988, Cihak brought Matthews to Houston to meet with First City's Energy Division to arrange financing for Calumet.

Prior to the meeting, Cihak informed the loan officers: the transaction was highly confidential; Cihak could vouch for the borrower's character; and normal due diligence was unnecessary. During the meeting, Matthews listed Calumet's needs; requested the loan be made quickly; described that repayment would be made from Calumet's cash flow—essentially, the seasonal sales of horses and breeding rights;

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[2] Because of other criminal activities while First City's vice chairman, Cihak was twice convicted of conspiracy, bank fraud, wire fraud, misapplication of bank funds, making false statements to a financial institution, making false entries in bank records, and money laundering. *See United States v. Cihak*, 137 F.3d 252 (5th Cir.), *cert. denied*, 525 U.S. 847, and *cert. denied*, 525 U.S. 888 (1998); *United States v. Allen*, 76 F.3d 1348 (5th Cir.), *cert. denied*, 519 U.S. 838, and *cert. denied*, 519 U.S. 841 (1996).

and provided financial statements and appraisals of Calumet's thoroughbreds, which were essentially the loan collateral.

Williams, the primary officer for the Calumet loan, testified Matthews never disclosed Calumet's cash flow problems or its difficulty in making payments to Citizens Fidelity. On the other hand, Williams' supervisor, Falk, admitted on cross-examination he was told of such difficulty.

Matthews told First City the appraisals he provided at the meeting were prepared by Robert Fox of Associated Thoroughbred Projects, S.I. (ATPSI); he advised that Fox was an independent appraiser with no connection to Calumet. Matthews did not inform First City that Fox acted as an agent for, and earned most of his income from commissions paid by, Calumet. Citizens Fidelity loan officers testified Fox's appraisals were "excessive" and "inflated".

The First City loan officers were directed by Cihak to make no "real independent analysis" and basically to use the information provided by Matthews and Lundy. The officers were not to contact Citizens Fidelity, or Calumet's owners or creditors, and not to obtain third party appraisals of the thoroughbreds. Refraining from contacting the current lender was not unusual, but the totality of these restrictions was contrary to First City's normal practice. Had it not been for Cihak, First City would not have made the loan.

Approximately one week after the meeting with Matthews , First City offered Calumet a three-year term loan of $15 million, with a $20 million revolving line of credit (revolver). Quarterly, Calumet was to pay $750,000 in principal, plus interest. The loan was funded in August 1988.

Almost immediately, Calumet had problems servicing it. Calumet had to draw on the revolver to make the interest payments, was late providing financial statements and compliance certificates, was unable to pay down the revolver in October and November as required under the agreement,

and made the quarterly principal payment by drawing on the revolver. The inability to pay down the revolver was significant, because it meant Matthews knew prior to the loan's funding that Calumet was not following its business plan submitted to First City and would be unable to generate cash flow sufficient to cover the payments as agreed.

In November 1988, Calumet requested an increase in the revolver to $50 million in order to pay insurance premiums on its horses. First City agreed to an increase to $31 million to protect its collateral. Matthews made assurances to First City that this was a one-time problem and Calumet would pay down the revolver by selling horses.

The primary loan officer at First City testified that, regarding the loan, he became aware Cihak was "making credit decisions . . . without contacting any of the . . . [loan] officers". Frequently, over the course of the loan, Cihak would negotiate directly with Matthews and Lundy regarding credit decisions without any involvement by the loan officers and would overrule those officers' decisions or make decisions with which they disagreed.

In January 1989, the Energy Division loan officers began to learn of Calumet's efforts to sell stallions to Japanese investors and Cihak's efforts, through a different First City division, Capital Markets, to facilitate the sale. That February, as discussed below concerning business transactions involving Matthews, Lundy, and Cihak, Cihak approved a $2.5 million increase in Calumet's revolver. That July, at a meeting at Calumet between Matthews and Lundy and the loan officers, to discuss the troubled status of the Calumet loan, the loan officers learned: Cihak had been to Calumet the previous weekend; Cihak had agreed to permit Calumet to defer a payment due on 15 August; Matthews and Lundy felt that, because of their relationship with Cihak, the loan officers' decisions were irrelevant; Cihak was actively involved in Calumet's deal to sell stallions to the Japanese

investors; and Cihak intended to keep the First City officers involved in that Japanese transaction separate from those involved in the Calumet loan.

In September 1989, Matthews provided a "Report of Mares Bred (1989)" to First City as its request; it listed mares bred with Alydar at Calumet. But, the report (in columnar format listing the name of the mare, location, dates, etc.) omitted the column listing the name of the mare's owner. The same report from Calumet's business files contained this column and listed Cihak as the owner of Lucinda Light.

Later that month, the loan officers attempted to amend the Calumet loan by: obtaining additional collateral; requiring specific future payments be made on the revolver; having the borrowing base reduced; and requiring further compliance reporting. In response, Matthews wrote Cihak discussing the proposals and requesting changes to the proposed amendments. The loan officers were unaware of Matthews' letter. Cihak agreed to Matthews' terms, informing the officers of the terms of the amendments—deferring certain payments and delaying payments on the revolver until 1 January 1990.

Shortly thereafter, Calumet failed to timely make the November 1989 principal payment. Later in November, Lundy informed the bank's officers that, in order to make the required payment, Calumet would borrow money from another lender. At this point, more than a year after the Calumet loan's funding, Calumet had not made a single payment from its cash flow, as initially promised.

Not surprisingly, communication between the loan officers and Matthews and Lundy "severely deteriorated"—Lundy never returned telephone calls, and contact with Matthews was limited. Calumet finally made the November payment on 2 January 1990, but failed to make the deferred revolver payments as agreed (following the September 1989 negotiations).

In January 1990, the Energy Division recommended to the loan review committee downgrading the Calumet loan to "substandard".[3] But, at a February loan review committee meeting with the Energy Division, Cihak made false statements concerning Calumet's credit.[4] The downgrade recommendation was not approved. That March, Cihak moved the Calumet loan to another First City division, which reported directly to Cihak and was headed by "one of Cihak's men" from his prior Chicago bank.

During these loan events, and as discussed below, Matthews, Lundy, and Cihak had several business dealings beneficial (at various times) to each of them. Three of those transactions were: Matthews arranged a transaction over New Year's Eve weekend 1988 (just prior to Cihak's approving the above-described $2.5 million increase in February 1989 to Calumet's revolver), which resulted in an approximate $1 million business deduction for Cihak against his 1988 taxes; Lundy gifted certain breeding rights to Cihak, worth $125,000 (also around the time of the $2.5 million revolver-increase); and as a favor to Cihak, Lundy borrowed $5.2 million to prevent a First City debtor from defaulting on a $140 million letter of credit.

In setting up the New Year's Eve weekend 1988 (NYE '88) transaction, Matthews in late 1988 told ECC, a company specializing in financing thoroughbred transactions Cihak wanted to borrow from ECC; Cihak did not need to provide financial statements to ECC, because Calumet would provide

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[3] At First City, loans were classified as "performing", "other assets expressly mentioned", "substandard", and "doubtful". A less favorable classification resulted in more scrutiny by the loan review committee, and classifying a loan as substandard required First City to increase its reserves to offset a potentially uncollectible debt (because of FDIC regulations).

[4] It was considered very unusual for Cihak, as Vice Chairman, to attend a loan review meeting.

ECC the money to lend Cihak; and ECC would not be required to repay those Calumet-provided funds if Cihak defaulted on the ECC loan. In orchestrating the NYE '88 transaction, Matthews gave written instructions to Cihak regarding checks to write, deposits to make, and the use of overnight couriers.

On 30 December 1988, Cihak signed a note to ECC for $1,105,000, due 15 February 1989 at 12.5 percent interest. The next day, 31 December, ECC's $1,105,000 check to Cihak was deposited in his account. When ECC's check was deposited in Cihak's account, ECC's bank balance was only $96,000. Nevertheless, ECC's $1,105,000 check was paid by ECC's bank on 4 January 1989. That same day, two deposits totaling $1,105,000 were made to ECC's account, allowing ECC's check to Cihak to clear. Those deposits were a $460,000 check from Calumet and a $645,000 check from ATPSI (the company operated by the above referenced Fox, the horse appraiser, and Alan Krutchkoff). Both checks had the notation "loan".

Krutchkoff testified: ATPSI relied upon Calumet for approximately 75 percent of its income; he did not recall the loan but acknowledged signing the check; the check likely related to a year-end tax deduction; and ATPSI's bank balance was only $130,800 when the $645,000 check to ECC was written on 31 December 1988. Two checks (one for $210,000 and another for $435,000), both written by Cihak, were deposited into ATPSI's account on 4 January 1989, permitting ATPSI's check to ECC to clear. The checks contained notations referring to an Alydar breeding season and the lease of a mare, the earlier referenced Lucinda Light.

On 2 March 1989, ATPSI was paid $300,000, leaving a "balance due" (after subtracting interest on the "loan") of more than $353,000 against the $645,000 check from ATPSI

to ECC.[5] The same day, ATPSI sent $225,000 to Maricopa Ranch (Matthews was a director and the registered agent; Lundy was the representative listed on several financing statements).

An FBI financial analyst, who examined the bank records involving the NYE '88 transaction, testified as follows. The proceeds of the $1,105,000 check to Cihak funded itself, because it "was the first in a series of [check] transactions . . . based on artificially inflated bank account balances . . . supported by worthless checks". Cihak had $65,000 in his account on 30 December 1988, but that day wrote four checks totaling $1,305,000—two payable to Calumet ($210,000 and $450,000) and two to ATPSI ($210,000 and $435,000). ATPSI wrote the $645,000 check to ECC on 31 December, based on Cihak's check artificially inflating its account; along with ATPSI's check, Calumet's check to ECC permitted ECC's $1,105,000 check to Cihak to clear. The FBI analyst testified: "Were it not for either one of those deposits, [the $1,105,000] check would have bounced, and then the other checks would have bounced as well".

As a result of the NYE '88 transaction, Cihak took a $1,305,000 business deduction on his 1988 tax return. Cihak also used some of the "funds" from the ECC $1,105,000 check to lease a mare, Stick to Beauty, to be bred with Alydar. The resulting foal was sold for $750,000 in October 1990, with Lundy acting as Cihak's agent for the sale. The funds were distributed: $671,688 to ECC; $34,365 to an insurance agency; and $43,746 to Cihak. Of the funds it

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[5] The source of the $300,000 paid to ATPSI is unclear. ATPSI received a wire transfer of $300,000 in March 1989. Krutchkoff wrote Lundy that August inquiring about Cihak and the Lucinda Light lease; both the letter and the transaction statement accompanying the letter attribute the $300,000 wire transfer as payments on the $645,000 "loan" from ATPSI to ECC. Krutchkoff's letter to Lundy was found during a search of the home of an associate of Cihak.

received, ECC wired $531,862 to Calumet in December 1990, and Calumet wired $512,833 of those funds to repay a $650,000 loan made to Cihak by Lee Casty, a Chicago associate of Cihak. Earlier, on 1 September 1990, Cihak had received $650,000 from Casty and had wired $150,000 to Lundy and $500,000 to Calumet; Calumet used the money to make a First City loan payment while Lundy used the money to make an interest payment on the $5.2 million First City loan (Lundy's favor to Cihak, described below).

The second of three of the above referenced transactions involving Cihak, Matthews, and Lundy began in early 1989, when Calumet, in an agreement signed by Lundy and Cihak, provided Cihak with Secreto's 1989 breeding season. The purchase price was "$1,00 (one dollar and other good and valuable consideration)". John Ward, who in 1991 replaced Lundy as Calumet's president, testified that, in the equine business, such language equates with a gift.[6] In January 1989, the Secreto season was valued at approximately $125,000.

The third referenced transaction began in early 1990, when Lundy borrowed $5.2 million from First City's Dallas bank purportedly for stock in a Spanish resort and artwork. In fact, the funds went directly to another bank to pay debts of another First City customer, the Coca family.[7] The loan closed and was funded prior to First City's receiving all the paperwork. The loan was issued in the name of John T.

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[6] According to Ward, Secreto was "one of the highest priced horses ever purchased". A breeding season lasts four to five months and gives exclusive breeding rights during that time.

[7] Cihak caused First City to execute a $120 million letter of credit to that bank on behalf of the Cocas. In early 1990, the Cocas needed $5.2 million to avoid default on debt owed to the other bank; if the Cocas defaulted, First City would lose $140 million. Cihak arranged for Lundy to borrow the $5.2 million and pressured Lundy to go through with the loan.

Lundy and Lucille Lundy, his wife, but Mrs. Lundy never signed the loan agreement. Lundy signed her name, claiming she gave him written authority to do so. At trial, as discussed in part II.E., Lundy's former wife (they divorced in 1993) testified she did not recall giving Lundy that authority; however, she testified earlier to the grand jury she did not authorize anyone to sign her name to the loan agreement. At trial, she testified she had not lied to the grand jury.

When First City attempted in 1991 to collect on the $5.2 million loan, Lundy responded: the loan was "an accommodation to the bank"; "the bank used [him] to funnel money to the Coca family"; and First City had represented to him that the Coca family would pay the loan, the value of the collateral exceeded the loan, the collateral could be easily liquidated in the event of default, and First City would refinance Lundy's farm and equine loans.

Prior to this collection effort, Lundy attempted to use the accommodation to cause First City to extend more credit to Calumet. In the summer of 1990, Cihak arranged for Robert Richley, First City's president, to meet with Matthews and Lundy to discuss Calumet's request for more credit. Richley opposed extending more. While Matthews was explaining Calumet's situation to Richley, Lundy interrupted Matthews and said: "Look, we need help here. And we helped you in Dallas and we expect to get helped here". Richley responded he had no idea what Lundy was talking about and ended the meeting.

Other evidence of side dealings between Cihak, Matthews, and Lundy included Cihak's indebtedness to Calumet. A September 1989 memo from Matthews to Lundy discussing Calumet's cash flow problems suggested that Calumet not pressure Cihak on his debt to Calumet and either allow him to defer payment as long as he could help Calumet or offer partial debt forgiveness as "compensation or [a] commission" for extending further credit on First City's loan. Further, in

early 1991, Lundy attempted to collect on a debt relating to the July 1984 purchase of a lifetime breeding right in Alydar (Cihak owned 25 percent of this right). As an accommodation, Lundy had not required payment during 1989 and 1990.

In May 1990, during a review of Calumet's compliance with First City's loan agreement, Calumet's accountants discovered a Calumet "loan" of $460,000 to ECC (the 4 January 1989 check supporting, in part, the NYE '88 transaction) and reported it to First City. Matthews immediately wrote First City: "The loan to [ECC] was a tax financing transaction to enable an individual to lease a mare at the end of 1988. Thus, Calumet did not actually lend the money to [ECC] but used [ECC] as a vehicle to add substance to the transaction". (Emphasis added.)

Neither Richley (First City's president), Falk (the earlier-referenced Energy Division group manager who supervised the Calumet loan), nor any loan officer in that division knew Cihak was the unidentified "individual" involved in the transaction. Had First City known that Cihak received either a substantial amount of money, or the Secreto season, or any other thing of value from Matthews or Lundy, Cihak might have been, among other things, terminated by First City. There was no prohibition on bank customers doing business with their bankers, but bank policy precluded Cihak from doing any business with Calumet because he was involved in the approval of Calumet credit decisions.

Because of an internal investigation begun during late summer 1990 into Cihak-related transactions at First City, Cihak obtained an affidavit from Lundy in January 1991 explaining: he had no business dealings with Cihak prior to 1988; the NYE '88 transaction involved "standard horse lease arrangements"; Cihak was given "no special consideration" in

the deal; the leases "were not special arrangements"; and he sold a half interest in Hail Secreto to Cihak in the spring of 1990.

By mid-1990, Calumet's debt at First City was approximately $40 million, and Calumet asked for another $15 million. Instead, in October 1990, First City restructured the account into a term loan of $42 million, with the first payment of $15 million due February 1991. Calumet was unable to make the November 1990 interest payment but made the $15 million payment because of insurance proceeds from a horse's death. Meanwhile, the internal investigation at First City resulted in Cihak's forced resignation in October 1990.

In the spring of 1991, Matthews and Lundy were dismissed by Calumet. Lundy's replacement, Ward, testified: as of Matthews' and Lundy's dismissals, Calumet was almost $60 million in debt, with First City being the largest creditor (more than $28 million); and Lundy received millions that should have gone to Calumet. Calumet declared bankruptcy in July 1991.

When Lundy was arrested in 1999, a handwritten letter found in his briefcase recited, *inter alia*, his recollection of a 1997 interview with FBI Agents. The letter: revealed Lundy lied to the Agents about his wife's signature on their 1990 and 1991 tax returns; requested the letter's recipient to obtain "a paper" (an affidavit) from Lundy's ex-wife stating either her signature was on the $5.2 million loan agreement or Lundy had power of attorney to sign her name; expressed Lundy's hope her statement would end the investigation or "prove [the $5.2 million loan] was an arm's length deal"; directed the recipient to call Lundy's ex-wife to assure her she would not get in trouble for signing an affidavit, an affidavit would save him, and it would keep her out of trouble. The letter further detailed Lundy's 1991 affidavit to First City, prepared for Cihak, (describing it as "close to

right") and discussed other business deals with Cihak, including a mining deal in Illinois.

Following a jury trial in early 2000, Matthews and Lundy were convicted of bank fraud, in violation of 18 U.S.C. §§ 1344 & 1366; bank bribery, in violation of 18 U.S.C. § 215; making false statements to a financial institution, in violation of 18 U.S.C. § 1014; and conspiracy to commit bank fraud and bribery and to make false statements to a financial institution, in violation of 18 U.S.C. § 371. Matthews and Lundy's October 2000 sentences imposed, *inter alia*, 21 and 54 months imprisonment, respectively, and approximately $20 million restitution by each of them.

II.

Matthews and Lundy claim insufficient evidence for each conviction and contest the jury instruction on false statements. In addition, Matthews asserts the court erred by not instructing on the defense of good faith and by admitting evidence of Cihak's banking policies violations; Lundy, that it erred by admitting his ex-wife's testimony concerning marital communications.

A.

"[A] defendant seeking reversal on the basis of insufficient evidence swims upstream". *United States v. Mulderig*, 120 F.3d 534, 546 (5th Cir. 1997), *cert. denied*, 523 U.S. 1071 (1998). Neither Matthews nor Lundy testified. Nor, other than through cross examination, did they present evidence in their defense. Of course, the burden of proof rests with the Government.

Evidence is sufficient to convict if, when viewed in the light most favorable to the verdict, "a rational jury could have found the essential elements of the crime beyond a reasonable doubt". *United States v. Dupre*, 117 F.3d 810, 818 (5th Cir.

1997), *cert. denied*, 522 U.S. 1078 (1998). It is unnecessary to disprove alternative theories because the jury's verdict can be supported by "reasonable constructions of the evidence". *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir.), *cert. denied*, 122 S. Ct. 142 (2001). Restated, all reasonable inferences are drawn in favor of the verdict. E.G., *United States v. Soape*, 169 F.3d 257, 264 (5th Cir.), *cert. denied*, 527 U.S. 1011 (1999).

1.

To prove a conspiracy violative of 18 U.S.C. § 371, the Government must show: an agreement between at least two persons to commit a crime; the defendant knowingly joined the conspiracy; and at least one overt act by a conspirator in furtherance of the conspiracy. *Cihak*, 137 F.3d at 259-60. The jury may infer from circumstantial evidence the existence of a conspiracy. *See United States v. Jensen*, 41 F.3d 946, 954-55 (5th Cir. 1994), *cert. denied*, 514 U.S. 1101 (1995). If found to be a member of a conspiracy, a defendant is liable for all substantive offenses committed in furtherance of it, even if he is unaware of those specific offenses. *United States v. Phillips*, 219 F.3d 404, 417 (5th Cir. 2000); *Jensen*, 41 F.3d at 955.

The Government notes the following evidence in support of the conspiracy convictions. Cihak interfered with the loan officers' attempts to secure payment on the Calumet loan by circumventing them and dealing directly with Matthews and Lundy. Following the downgrade recommendation for the loan, Cihak's false statements to the loan review committee and Cihak's eventual transfer of the loan to another division, controlled by Cihak's associate, are acts in furtherance of the conspiracy. In exchange, Cihak was provided benefits: when Matthews structured the NYE '88 transaction to provide Cihak with a $1,105,000 tax deduction while concealing Matthews, Lundy, and Calumet as the source of the funds;

when Cihak was gifted the Secreto breeding season; and when Lundy obtained the $5.2 million loan as a favor to Cihak.

Because Cihak approved a $2.5 million increase in the Calumet loan shortly after the Secreto gift and the NYE '88 transaction, the Government contends the jury could infer the existence of the conspiracy. Also, the Government contends evidence of the conspiracy is found in Matthews' September 1989 memo to Lundy suggesting Lundy bribe Cihak by deferring his debt to Calumet in exchange for favorable treatment on the Calumet loan.

Defendants state the conspiracy charge is based on the acts charged in the bank fraud, bank bribery, and false statements counts, in addition to two other acts: the $5.2 million loan to Lundy and the Secreto season gift. Their contentions concerning the substantive charges are discussed below. As to the other two acts, Defendants assert: the evidence did not establish First City's knowledge or understanding as to the $5.2 million loan or the validity of Mrs. Lundy's signature and there is no evidence that Lundy or Matthews attempted to hide the loan from First City; and evidence concerning the Secreto season did not establish it was, in fact, a gift, as opposed to part of other transactions between Calumet and Cihak.

There was sufficient evidence for the conspiracy convictions, as further shown below. Viewing the earlier described evidence, and drawing all reasonable inferences in the light most favorable to the verdict, a rational jury could have found, beyond a reasonable doubt, the elements for a conspiracy involving Matthews, Lundy, and Cihak to commit bank bribery and fraud, and to make false statements to a financial institution.

2.

To establish bank fraud violative of 18 U.S.C. § 1344, the Government must prove Matthews and Lundy knowingly executed, or attempted to execute, a scheme to defraud a federally-chartered or federally-insured financial institution. *United States v. Doke*, 171 F.3d 240, 243 (5th Cir.), *cert. denied*, 528 U.S. 907 (1999). The requisite intent is established by proving the defendant acted with the specific intent to deceive to bring about financial gain to himself. *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992). The scheme to defraud may include false representations intended to deceive the institution in order to obtain money from it. *See United States v. Hanson*, 161 F.3d 896, 900 (5th Cir. 1998) (quoting Saks, 964 F.2d at 1518). Any false representation must be "material"—capable of influencing the institution's decision-making process. *See Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. Moser*, 123 F.3d 813, 826 n.11 (5th Cir.), *cert. denied*, 522 U.S. 1020, and *cert. denied*, 522 U.S. 1035 (1997), and *cert. denied*, 522 U.S. 1092 (1998).

Modeled after the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, the bank fraud statute is interpreted in the light of the precedent interpreting those statutes. *Saks*, 964 F.2d at 1520-21. A "representation may be false when it constitutes a half truth or effectively conceals a material fact, providing it is made with the intent to defraud". *Moser*, 123 F.3d at 826; *see* also *Blachly v. United States*, 380 F.2d 665, 673-74 (5th Cir. 1967) ("[A] scheme may be fraudulent even though no affirmative misrepresentation of fact be made. The deceitful *concealment of material facts* may also constitute actual fraud". (citations omitted; emphasis added)).[8]

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[8] Most circuits agree false representations or statements include concealment of material facts. *See, e.g., United States v. Colton*, 231 F.3d 890, 901 (4th Cir. 2000) ("deceptive acts or contrivances intended to hide

Of course, fraud claims must be based on misrepresentations of material fact, not opinion. *See Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 678-79 (5th Cir. 1986) (civil suit alleging common law fraud). Matthews contends that, even if the Calumet business plan was false, it does not constitute fraud because it was merely an expression of opinion. Defendants contend First City was informed of Calumet's cash flow problems, and Matthews asserts the loan officers' testimony reflects they felt Matthews believed what he told First City during the pre-loan period and they could not conclude he intentionally misled them.

Defendants maintain that, absent a duty to disclose, a fraud conviction cannot be based on the failure to disclose information. *See Chiarella v. United States*, 445 U.S. 222, 235 (1980). Defendants contend there is no duty to disclose a customer's dealings with his banker; rather, the burden of disclosure is on the banker. Further, they assert the omission of the owners' names on the Report of Mares Bred was consistent with Calumet's confidentiality policy for its customers.

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information, mislead, avoid suspicion, or avert further inquiry into a material matter" sufficient proof for scheme to defraud); *United States v. Molinaro*, 11 F.3d 853, 861 (9th Cir. 1993), *cert. denied*, 513 U.S. 1059 (1994) (concealment of nature of a financial transaction part of scheme to defraud); *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993) (scheme to defraud shown by "nondisclosure manifesting an intent to defraud"); *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989) (false representations include "deceitful statements of half truths or the concealment of material facts") (quoting *United States v. Allen*, 554 F.2d 398, 410 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977)); *United States v. Walker*, 871 F.2d 1298, 1308 (6th Cir. 1989) (statement containing half truths or concealing material fact is false); *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987) (scheme to defraud includes false representations or concealing material facts).

The Government counters that: the bank, mail, and wire fraud statutes do not require that there be a duty to disclose; the scheme to defraud is a "departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987); *see also United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982). The Government also cites two cases from other circuits which reaffirm the principle that the bank, mail, and wire fraud statutes do not require a duty to disclose imposed by statute or regulation. See *Colton*, 231 F.3d at 904; *United States v. Morris*, 80 F.3d 1151, 1161 (7th Cir.), cert. Denied, 519 U.S. 868 (1996).

As with the conspiracy charge, the evidence is more than sufficient for bank fraud. For example, the request for "confidentiality", the representations during the pre-loan period that Fox was an independent horse appraiser, Matthews' promises to sell horses during negotiations over the extension of more credit to Calumet, and Matthews' concealment of Calumet's dealings with Cihak are sufficient evidence for a rational juror to find, beyond a reasonable doubt, concealment of material facts constituting misrepresentations intending to deceive First City for the purpose of obtaining money for Calumet. *See Dupre*, 117 F.3d at 819-20.

3.

A defendant makes a false statement to a financial institution, violative of 18 U.S.C. § 1014, if he made a false statement to influence in any way the actions of a financial institution with regard to its lending activities. *See United States v. Blocker*, 104 F.3d 720, 733 (5th Cir. 1997). Section 1014 applies to any false statement made to a financial institution involving credit, not just statements made prior to and at the time of funding. *United States v. Kindig*, 854 F.2d 703, 706 (5th Cir. 1988). Unlike the bank fraud statute, the

false statement need not be material; § 1014 proscribes a falsehood that influences, in any way, the bank's actions. *See United States v. Wells*, 519 U.S. 482 (1997).

The Government contends: the intentional concealment of Matthews' arrangement of the $1,105,000 tax deduction for Cihak (NYE '88 transaction), including advising that any "individual", rather than Cihak, received $460,000 from Calumet in connection with the NYE '88 transaction, was a false statement intending to influence the bank's lending activity; Cihak was instrumental in approving the Calumet loan and overruling the decisions of the loan officers; and concealing the benefits Matthews and Lundy provided Cihak was essential to the continuation of their favorable treatment because the bank might have fired Cihak had it known of the benefits he received from Calumet, Matthews, and Lundy.

Matthews and Lundy contend: the omission was either not intentional or not intended to deceive First City; the bank policy required reporting by the banker, not the customer, of preferential treatment; and not only was there no evidence that Matthews or Lundy knew of this policy, but also there was no evidence that the NYE '88 transaction constituted preferential treatment. Further, Matthews' response (using the term "individual", instead of naming Cihak) to First City's inquiry about the Calumet $460,000 loan concerning the NYE '88 transaction was in a form commonly used by CPAs, and as a lawyer, Matthews had a duty of confidentiality and loyalty to Cihak as his client. Finally, because the transaction was recorded (by equine industry standards), there was no evidence Matthews or Lundy attempted to hide the transaction.

The evidence relating to the § 1014 charge is described earlier. As with the evidence for bank fraud, there is sufficient evidence for a rational juror to find, beyond a

reasonable doubt, that, in violation of 18 U.S.C. § 1014, Matthews and Lundy made false statements to First City with the intent to influence it.

4.

Bank bribery, violative of 18 U.S.C. § 215, consists of corruptly giving or promising something of value to, among others, an officer or employee of a federally-insured financial institution "with intent to influence or reward" him regarding bank business. 18 U.S.C. § 215(a). The Government contends: the $1,105,000 tax benefit provided to Cihak (NYE '88 transaction) was a reward for his involvement in increasing the Calumet loan, especially because Cihak approved a $2.5 million increase shortly thereafter; and an explicit promise was not required, because the jury could infer Cihak accepted the benefit "knowingly . . . it was payment related to his using his influence . . . as specific opportunities arose". *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993), *cert. denied*, 510 U.S. 1095 (1994). Defendants respond that the evidence did not reflect a corrupt intent, but rather the NYE '88 transaction was a legitimate business transaction financed in a tax advantageous way and handled by a third-party attorney that was not concealed.

The evidence was far more than sufficient for a rational juror to find bank bribery beyond a reasonable doubt. Based on the strong casual connection between the NYE '88 transaction and Cihak's increase in Calumet's loan and the gift of the Secreto season, a rational juror could find that Matthews and Lundy provided Cihak with benefits with the intent of rewarding him for favorable treatment on the Calumet loan.

B.

Defendants contest the jury instruction defining the 18 U.S.C. § 1014 crime of making a false statement to a financial institution. Jury instructions are reviewed only for

an abuse of discretion. *E.g., United States v. Pankhurst*, 118 F.3d 345, 350 (5th Cir.), *cert. denied*, 522 U.S. 1030 (1997). At issue is "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as tot eh principles of law applicable to the factual issues confronting them." *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir.), *cert. denied*, 516 U.S. 901, and *cert. denied*, 516 U.S. 903, and *cert. denied*, 516 U.S. 970 (1995) (quoting *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990)). The instruction read in part:

> A person makes a false statement under this statute if he fails to disclose material information to a federally insured bank in connection with a loan transaction.

Matthews and Lundy contend: the court erred by failing to include language they claim is required by *Dupre*, 117 F.3d at 819, and *United States v. Trice*, 823 F.2d 80, 86 (5th Cir. 1987) ("section 1014 [may be violated by] the failure to disclose material information *needed to avoid deception* in connection with a loan transaction" (emphasis added)); and such omitted language requires the jury to find an affirmative statement rendered deceptive by concurrent omissions or an omission when there is a duty to speak. Along this line, Defendants also base error on the instructions failing to state that, as discussed *supra*, concerning bank fraud, intentional omissions without a duty to disclose did not constitute a false statement.

The Government first correctly observes that neither Defendant objected to the omission of the phrase "needed to avoid deception" nor suggested its inclusion. Second, the Government responds that intentional omissions of material facts can constitute a violation of § 1014.

Matthews and Lundy each made general objections to the instruction, claiming intentional omissions without a duty to disclose did not constitute a false statement. Indeed, Lundy's

counsel even stated that the exact phrase now urged as correct did not make a "good jury instruction[]". Consequently, any issue relating to the omission of the "need to avoid deception" phrase is reviewed only for plain error. *E.g., United States v. Heath*, 970 F.2d 1397, 1407 (5th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993); *cf. United States v. Polasek*, 162 F.3d 878, 883 (5th Cir. 1998).

Plain error occurs where a "clear" or "obvious" error affects substantial rights. *See United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994), *cert. denied*, 513 U.S. 1196 (1995). Even then, we have discretion whether to correct the error and, generally, will not do so unless it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (internal quotation marks omitted).

Although both *Dupre* and *Trice* use the "need to avoid deception" language, it is not "clear" or obvious" that the language was required in the instruction. In an event, the § 1014 instruction required finding Defendants intentionally failed to disclose material information to a federally insured bank regarding a loan transaction *for the purpose of influencing its lending activities*, which is more than the statute requires. *See* 18 U.S.C. § 1014. There was no error, plain otherwise.

With respect to Defendants' remaining contentions concerning the § 1014 instruction, and as discussed above, an intentional omission of material fact can constitute a false statement if made for the purpose of influencing a federally-insured bank's lending activities. *Doke*, 171 F.3d at 246 (intentional failure to disclose defendant's status an nominee in loan transaction); *Dupre*, 117 F.3d at 819; *United States v. Waldron*, 53 F.3d 680, 682 n.4 (5th Cir. 1995) (rejecting literal truth defense because concealed fact effected the loan transaction), *vacated on other grounds*, 516 U.S. 928 (1995).

The instruction, as a whole, is a correct statement of the law. Consequently, the court did not abuse its discretion in its § 1014 false statements instruction.

C.

Matthews also contends the district court erred in failing to instruct on the defensive theory of good faith. Again, we review for abuse of discretion. Not giving a requested instruction is an abuse of discretion if: the requested instruction was substantially correct; it was not substantially covered in the charge given; and the refusal impaired the defendant's right to a fair trial. *E.g., United States v. Webster*, 162 F.3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999).

Matthews asserts: good faith is a complete defense to charged intent to defraud; the court's instruction on "knowingly" did not substantially over what was requested in his good faith instruction; and a defendant is entitled to an instruction on as many defensive theories as are raised by the evidence. The Government responds: a good faith instruction is not required if the jury is instructed properly on the elements of an offense, including the requisite mental state; the given instructions "fairly and adequately" covered the good faith issue, *United States v. Daniels*, 247 F.3d 598, 601 (5th Cir.), *cert. denied*, 122 S. Ct. 288 (2001); and throughout the trial, Matthews presented the good faith defense to the jury.

There was no abuse of discretion. The instructions substantially covered the requested instruction by defining and/or explaining the following terms: "knowingly" (conspiracy, bank fraud, false statements), A "willfully" (conspiracy), "corruptly" (bank bribery), and "material" and "purpose of influencing" (false statements). Further, Matthews was fully able to present his defense to the jury during his cross-examination of First City's loan officers and

his closing argument. *See United States v. Chaney*, 964 F.2d 437, 445-46 (5th Cir. 1992) (citing *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir. 1990)) (no abuse of discretion when jury instructed as to the terms "knowingly" and "intent to defraud" and defendant able to argue good faith before jury).

D.

Matthews bases error on the admission of Cihak's banking policy violations. We review for abuse of discretion. *United States v. Harvard*, 103 .3d 412, 422 (5th Cir.), *cert. denied*, 522 U.S. 824 (1994); *see* Fed. R. Evid. 103.

Matthews states correctly that violation of a civil regulation cannot be used to establish criminal conduct. *See United States v. Christo*, 614 F.2d 486 (5th Cir. 1980). On the other had, he fails to address the fact that evidence of such violations is admissible to show motive or intent. *Harvard*, 103 F.3d 890, 866-67 (5th Cir. 1995), *cert. denied*, 516 U.S. 1098, and *cert. denied*, 516 U.S. 1133, and *cert. denied*, 516 U.S. 1151 (1996).

The court did not abuse its discretion by admitting evidence of Cihak's banking policy violations. The evidence concerning First City's policies prohibiting its officers from entering into certain business relationships with borrowers was offered to show Matthews' and Lundy's motive for concealing from First City their various deals with, and benefits to, Cihak. Furthermore, the court gave a cautionary instruction regarding bank policies to prevent "bootstrapping" policy violations into a conviction. *United States v. Cordell*, 912 F.2d 769, 777 (5th Cir. 1990).

E.

Lundy challenges the district court's allowing testimony by his former wife, Lucille Drinkwater, about her confidential communications with him. Again, the admission of evidence is reviewed for abuse of discretion.

There are two distinct aspects of the marital privilege: one spouse cannot be compelled to testify against the other; and a spouse cannot testify about confidential communications made during the marriage. *United States v. Ramiriz*, 145 F.3d 345, 355 (5th Cir. 1998). The first aspect ends on termination of the marriage. *United States v. Crockett*, 534 F.2d 589, 604 n.17 (5th Cir. 1976). Lundy and Drinkwater divorced in 1993, long before trial. Therefore, he can only contest testimony about confidential communications.

The privilege "extends only to utterances, and not acts." *Pereira v. United States*, 347 U.S. 1, 6 (1954). Drinkwater's testimony regarding whether she signed the $5.2 million loan did not involve any confidential communications, so any objection by Lundy as to that testimony is meritless.

In addition, Drinkwater was questioned about her prior inconsistent grand jury testimony concerning statements by Lundy. The court properly noted such testimony was introduced to impeach Drinkwater rather than as substantive evidence. There was no abuse of discretion in admitting prior grand jury testimony for that purpose. See Fed. R. Evid. 801(d)(1); see also, e.g., *Howard v. Gonzales*, 658 F.2d 352, 356 (5th Cir. Unit A 1981).

III.

The evidence was more than sufficient for a rational juror to find, beyond a reasonable doubt, that Defendants were guilty of conspiracy, bank fraud and bribery, and making false statements to a bank. Regarding the challenged jury instructions, the court did not err in giving the one on false statements and in refusing the cone on good faith. Finally, it did not abuse its discretion in admitting evidence concerning banking policy violations and claimed marital communications. Therefore, the judgment is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20961

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GARY MATTHES, JOHN T. LUNDY,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District
of Texas, Houston

(Opinion 1/28/02, 5 Cir., _____, _____ F.3d _____)

Before DUHE, WIENER and BARKSDALE, *Circuit Judges.*

PER CURIAM:

( ) The Petition for Rehearing filed by appellant John T. Lundy is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc filed by appellant John T. Lundy is also DENIED.

ENTERED FOR THE COURT

_____

United States Circuit Judge

APPENDIX C

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Resolution Trust corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank

(as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or otherwise, or the acceptance, release or substitution of security therefore, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or otherwise, or the acceptance, release or substitution of security therefore, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.